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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35057

**NEW YORK & ATLANTIC RAILWAY COMPANY'S
AND COASTAL DISTRIBUTION, LLC'S
RESPONSE TO PETITION TO REOPEN**

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January 7, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35057

**NEW YORK & ATLANTIC RAILWAY COMPANY'S
AND COASTAL DISTRIBUTION, LLC'S
RESPONSE TO PETITION TO REOPEN**

New York & Atlantic Railway Company ("NYA") and Coastal Distribution, LLC. ("Coastal") respectfully move to dismiss or deny the petition of Babylon and Pinelawn Cemetery to reopen this proceeding

1 The Board has already ruled that it did not have jurisdiction over the Farmingdale Facility¹

2. Congress, in the Clean Railroads Act definitively has removed this facility from the Board's jurisdiction, unless the Governor petitions the Board under very limited circumstances. The petitioners here do not have standing to file any petition with the Board relating to this facility.

3. Only the D.C. Circuit can now determine the validity of the Board's prior Orders. Thus, the decision the petitioners seek is outside the jurisdiction of the Board and would be meaningless anyway. the facility is now subject to State law and is proceeding under State law to full compliance.

¹ NYA and Coastal believe that decision was erroneous and have filed a petition to Review with the Court of Appeal for the District of Columbia Circuit, *New York & Atlantic Railway Company and Coastal Distribution, LLC v. Surface Transportation Bd and United States of America*, No 08-1335

Procedural Status

In 2005, the District Court enjoined Babylon from enforcing its zoning laws to shut down the Farmingdale facility. Thereafter, Babylon moved to vacate that injunction on the strength of this Board's Declaratory Orders in this Docket. While Babylon's motion was being briefed, Congress enacted the Clean Railroads Act of 2008, which comprehensively legislated the substantive and procedural standards for regulating solid waste rail transfer facilities. NYA and Coastal are currently attempting to amend their complaint and seek a new preliminary injunction under the terms of the Clean Railroads Act. Now, Babylon has filed this petition - without any leave from the Court - in what appears to be an attempt to end-run the federal judiciary. NYA and Coastal have opposed Babylon's request to stay the judicial proceedings. A copy of that opposition is attached as Attachment A.

Status of the Farmingdale Facility

As established in the affidavit of Bruce Lieberman, submitted to the District Court and attached as Attachment B, Coastal and NYA approached the New York State Department of Environmental Conservation in early 2008, following the Board's initial decision in this matter, to seek regulatory oversight of the Farmingdale facility. The NYSDEC did not take any formal permit action because of the unsettled nature of the DEC's jurisdiction vis-à-vis the STB, but the DEC has asserted its health and safety jurisdiction at all times. DEC formally inspected the facility in October, 2008 and found the facility was operating in compliance with all applicable requirements. Under the authority of the Clean Railroads Act, DEC issued a formal consent order permitting continued operation at Farmingdale pending filing and issuance of a State Part 360 Permit for the operation of a solid waste rail transfer facility. The application will be filed in

a few days. Accordingly, the Farmingdale facility is in full compliance with the procedures mandated by Congress in the new statute and with the law of the State of New York.

I. THE CLEAN RAILROADS ACT OF 2008

The Clean Railroads Act of 2008 is set forth in Title VI of the Railroad Safety Act of 2008, Pub.L 110-432, 122 Stat. 4848. The new Act amends 49 U.S.C. §10501(c)(2), the jurisdiction provision of the Interstate Commerce Commission Termination Act, to simply eliminate STB jurisdiction over any "solid waste rail transfer facility," except as provided by two new sections added to ICCTA. The new §10908(a) provides:

(a) IN GENERAL.—Each solid waste rail transfer facility shall be subject to and shall comply with all applicable Federal and State requirements, both substantive and procedural, including judicial and administrative orders and fines, respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, including laws governing solid waste, to the same extent as required for any similar solid waste management facility ... that is not owned or operated by or on behalf of a rail carrier, except as provided in section 10909 of this chapter.

Congress has affirmatively exercised its Commerce Clause authority and assigned jurisdiction over the operation of solid waste rail transfer facilities to the States. In addition, new section 10908(b) sets forth a transition schedule for existing facilities: those facilities must comply with all regulations other than permit requirements within 90 days, and unless it has already obtained any required permit, the facility must apply for such permit within 180 days. However, Congress did not require that any existing facility be automatically relocated. Instead, the statute expressly exempts existing facilities from any requirement to possess any siting permit:

(B) SITING PERMITS AND REQUIREMENTS. --A solid waste rail transfer facility operating as of the date of enactment of the Clean Railroads Act of 2008 that does not possess a State siting permit required pursuant to subsection (a) as of such date of enactment shall not be required to possess any siting permit to continue to operate or comply with any State land use requirements. The Governor of a State in which the

facility is located, or his or her designee, may petition the Board to require the facility to apply for a land-used exemption (emph. added)

Id. at §10908(e)(3). Congress addressed the problem of parochial local interests like Babylon's by completely preempting local ordinances:

(3) STATE REQUIREMENTS.--In this section the term 'State requirements' does not include the laws, regulations, ordinances, orders, or other requirements of a political subdivision of a State, including a locality or municipality, unless a State expressly delegates such authority to such political subdivision.

Congress has eliminated STB jurisdiction, and the federal preemption that accompanies Board jurisdiction, over the permitting and operation of solid waste rail transfer facilities. Now, those facilities must comply with state law, with the sole exception that existing facilities need not be closed for not complying with State land use requirements. However, even land-use restrictions can be enforced against existing facilities under a special procedure §10908(b)(2)(B) allows the State Governor to petition to apply such restrictions, and if he or she does so, §10909 sets out procedures and standards to be applied by the STB in determining whether that particular facility should be exempted from such requirements.

(e) EXISTING FACILITIES.--Upon the granting of [a] petition from the State in which a solid waste rail transfer facility is operating as of the date of enactment of the Clean Railroads Act of 2008 by the Board, the facility shall submit a complete application for a siting permit to the Board pursuant to the procedures issued pursuant to subsection (b). No State may enforce a law, regulation, order, or other requirement affecting the siting of a facility that is operating as of the date of enactment of the Clean Railroads Act of 2008 until the Board has approved or denied a permit pursuant to subsection (c).

49 U.S.C. §10909(e)(emph. added). In short, Congress has provided a federal procedure for States to enforce their land-use regulations against already operating solid waste rail transfer facilities. That remedy can only be invoked by the Governor of the State, and until the Board acts, siting restrictions may not be enforced. Stated simply, the permitting and operation of solid

waste rail transfer facilities, without regard to whether the operator is or is not a railroad, or an agent of a railroad, has been removed from the STB's jurisdiction. Existing facilities are subject to State law except land use restrictions. The only way that STB jurisdiction can be established is if a Governor requests application of land use restrictions, and therefore, only the Governor of New York or his designee has standing to petition this Board for relief.²

For the Board now to entertain Babylon's petition would fly in the face of the Act's express elimination of municipal ordinances from the "State" laws with which a facility must comply, and with the careful limitation of standing to the 50 state Governors. The Governor of New York is not the petitioner here. Accordingly, the Board has no jurisdiction to consider the meaning, application or scope of the Clean Railroads Act.

II. THE BOARD DOES NOT HAVE JURISDICTION TO EVEN ENTERTAIN THIS PETITION

NYA and Coastal filed their Petition for Review of the decisions in this Docket on October 23, 2008. Upon filing of that petition, jurisdiction over this proceeding was transferred to the Court of Appeals. "The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review." 28 U.S.C. §2349(a). Accordingly, even if this Board were inclined to grant the Petition to Reopen, it no longer has the authority to act in this proceeding. At this point in the proceedings of Finance Docket No. 35057, the only body with authority to reopen is the Court of Appeals, by mandating this Board to do so.

² With respect to new facilities, only "a solid waste rail transfer facility, or a rail carrier that owns or operates such a facility" has standing to invoke the Board's jurisdiction. §10909(a)(1)

III. THE FEDERAL DISTRICT COURT WILL DETERMINE WHETHER THE FARMINGDALE FACILITY IS A SOLID WASTE RAIL TRANSFER FACILITY

The applicability of the Clean Railroads Act to the Farmingdale facility is the subject of pending motions before Judge Seybert in the Eastern District of New York. The issue raised here by Babylon will be definitively resolved in the near future. Accordingly, the STB's interpretation of the new statute is not necessary to terminate this matter or resolve any uncertainty. Further, the applicability of the Clean Railroads Act to Farmingdale Yard does not require construction of any term of art, cf., *Illinois Terminal R Co v I C C.*, 671 F 2d 1214 (8th Cir 1982)(meaning of "Bridge Toll"); *Commerce Express, Inc –Petition For Declaratory Order--Certain Rates And Practices Of United Shipping Company, Inc.*, F.D. 40348 (served Oct 1, 1992)(distinguishing contract from common carriage). Therefore the Board lacks justification under the Administrative Procedures Act to render an advisory opinion here. 5 U S C §554(c)³

CONCLUSION

At the current juncture, there is nothing for this Board to address. The facility at Farmingdale Yard is no rogue operation using its rail status to evade safety and sanitation standards; its operations have been temporarily approved by the NYSDEC. This docket including the prior decisions of this Board are before the Court of Appeals; the application of the Clean Railroads Act is before the Eastern District of New York; the continuing health and safety of Farmingdale Yard is before the New York Department of Environmental Control, and Congress has specified Petitioners' sole remedy for their zoning claim – they can only seek the intervention of the Governor of New York.

³ The Board's original decision to entertain this declaratory proceeding relied on the Second Circuit's invitation. That invitation was based on a statute that has since been fundamentally amended as it concerns solid waste transfer facilities. The invitation is no longer applicable

The Board should deny or dismiss the Petition to Reopen.⁴

Dated. January 7, 2009

Respectfully submitted,

By: /s/Ronald A. Lane

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Coastal Distribution, LLC*

⁴ Respondents respectfully reserve the right to submit additional evidence and argument in the event the Board determines to reopen this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2009, I have caused to be electronically filed with the Surface Transportation Board the foregoing **RESPONSE TO PETITION TO REOPEN** and have served a true and correct copy thereof upon the following parties:

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Washington, D.C. 20423-0001

via deposit in the United States Mail chute located at 29 North Wacker Drive, Chicago, Illinois, with proper postage prepaid

/s/Ronald A. Lane

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January 6, 2009

Hon Joanna Seybert
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New York, N Y 11722-4449

Re: Coastal Distribution, LLC ("Coastal")
New York & Atlantic Railroad ("NYAR")
v The Town of Babylon ("Town")
CV 05-2032

Dear Judge Seybert:

This office represents Coastal Distribution, LLC in this matter but in this instance I am writhing on behalf of both plaintiffs

By order of this Court, the opposition memoranda of defendant Town of Babylon and defendant-intervenor, Pinelawn Cemetery ("defendants") to the motions to for leave to file an amended complaint and for a preliminary injunction brought by plaintiffs Coastal Distribution LLC and New York & Atlantic Railway Company (NY&A) ("plaintiffs") were to be filed on December 18, 2008.

Defendants failed to file any opposition to the motions. They are in default or do not oppose these motions. Further, Defendants now state that they are not opposed to continuance of the stay – albeit to seek relief from the STB - and have apparently withdrawn their motion to lift the current preliminary injunction.

Instead, defendants filed a letter request for a stay of this action. The sole reason they assert in justification of this request – which is not made in form of a motion – is that they are seeking an advisory opinion from the Surface Transportation Board (STB) as to the applicability of the Town's Zoning Laws to the Farmingdale transload facility in light of the passage of the Clean Railroads Act of 2008.

The request is merit less. The Court should deny the stay, and rule on the pending, unopposed motions for two reasons.

First, the Clean Railroads Act of 2008, which became effective on October 16, 2008, amends 49 U.S.C. § 10501(c)(2), the jurisdiction provision of the Interstate Commerce Commission Termination Act eliminating STB jurisdiction over any "solid waste rail transfer facility," except for two narrowly-defined circumstances: if a State's governor requests application of land-use restrictions to a particular operation (see 49 U.S.C. § 10908(b)(2)(B)), § 10908(e), or if a railroad or a rail facility operator seeks exemption from land-use restrictions for an operation (see 49 U.S.C. § 10909(e)). This material change in the law is explained in the memorandum in support of plaintiffs' motion for a preliminary injunction. Notably, defendants, in their papers before this Court, do not contend otherwise.

Indeed in their renewed petition before the STB, defendants admit, "the 2008 Act removes solid waste transfer facilities from the Board's jurisdiction except for certain limited purposes" (Petition, at p. 11.)

Neither of the two statutory exceptions, which might create STB jurisdiction, are present in this case. There is no dispute as to this proposition. Accordingly, the STB simply has no jurisdiction under the new law. Defendant's new petition is frivolous.

Second, plaintiffs are entitled to proceed against defendants even apart from any consideration of federal law.

The gravamen of defendants' position is that since the STB has no jurisdiction, Babylon is, *ipso facto*, entitled to apply its local zoning laws to shut down this facility that has been operating for the last 105 years. Defendants are quite mistaken.

As shown in plaintiffs' motion for a preliminary injunction (at pages 10-12), New York state law precludes Babylon from exercising zoning authority over the Farmingdale facility. The facility is located on property leased to the Long Island Railroad, which is now MTA property. Title 11, Section 1266 of the Public Authorities Law prohibits towns such as Babylon from exercising any jurisdiction over any of the facilities, activities or operations conducted by the MTA or carried on in its behalf.

Any question about the applicability of the Public Authorities Law is dispelled by the MTA, which has provided proof to be submitted with the State permit application that it is the owner of the lands in issue in that it has 99 year leases renewed to July 31, 2102 and 2103, respectively and that it did approve the designation of Coastal Distribution, LLC as the operator of the facility for the New York & Atlantic Railroad in furtherance of fulfilling the MTA's common law and statutory freight service obligations.

When the MTA acquired the LIRR, it acquired the latter's federal common carrier obligations which include the operation of the Farmingdale facility. In order to meet its common carrier obligations, the MTA, acting through the LIRR, entered into the Transfer Agreement with the NY&A also including the Farmingdale operation. The continued operation of the Farmingdale facility by NY&A and Coastal fulfills the MTA's common

carrier obligation to do so. Accordingly, the Public Authorities Law bars application of the laws and regulations of the Town of Babylon to the Farmingdale operation, a fact defendants have not contested.

Moreover, as also demonstrated in plaintiffs' memorandum in support of a preliminary injunction – and as previously found by this Court in the context of the earlier preliminary injunction proceedings, after a two-day hearing – there is a substantial likelihood that plaintiffs will prevail on their claim that the Town is equitably estopped – due to its wrongful and negligent conduct, and its express pre-construction representations to plaintiffs that it had no jurisdiction or interest in the Farmingdale facility – from applying its local zoning laws to shut down the facility.

The application of equitable estoppel based on the Town's conduct is not in any way affected by the defendant's new petition before the STB.

Finally, the equities strongly disfavor defendants' request for a stay.

This latest round of litigation in this Court was initiated when, on defendants filed a motion to vacate the preliminary injunction, which this Court granted. Plaintiffs opposed defendants' motion to vacate, and filed the present motions for leave to amend the complaint and for a preliminary injunction. Defendants waited until after plaintiffs had filed their response and cross motions to, inform the Court, in their letter requesting a stay that they do not object to the continuation of the preliminary injunction.

The stay of this proceeding is unwarranted. The continuation of this controversy is keeping the Farmingdale facility from fulfilling its potential to serve the people of Long Island. As was established at the two-day hearing, the facility cannot attract non-construction and demolition debris customers until its right to remain open in perpetuity is assured. The Long Island market is dominated by high end inbound cargo. The one such cargo amenable to rail transport at this time is construction material. Unlike construction and demolition debris, construction material is ordered well in advance of actual need and must have an assured destination when ordered. Regularly scheduled outbound cargos also cannot be attracted to a facility that may not be open in a week or a month. No business can terminate existing trucking arrangements without having a permanent replacement.

Construction and demolition debris, in contrast, is a spot cargo, which moves by the cheapest mode available on the date and at the hour when the material is ready to ship.

Because this litigation remains unresolved, plaintiffs are unable to offer assurances to potential customers that they will be able to continue operating the Farmingdale facility into the future. High value cargo cannot use the Farmingdale facility until such shippers can be given assurances of its continued availability. The net effect is that considerable truck traffic will remain on the roads and highways of Long Island until this matter is concluded, a situation, which is injurious to the public interest.

This case has dragged on for years. No valid reason exists for a stay. Defendants' strange actions leave plaintiffs' motions for leave to file an amended complaint and for a preliminary injunction unopposed. Rather than reply to plaintiffs' opposition to their motion to lift the current preliminary injunction, defendants agree to its continuation.

Adding to the absurdity of the defendants' further resort to the STB, the State of New York, upon clarification of its jurisdiction over this facility, immediately entered into a consent order allowing the facility to continue to operate pending plaintiffs' receipt of the State License now required by the Clean Railroads Act. The license application is being prepared and is expected to be filed by January 15, 2009.

Plaintiffs therefore respectfully request that this proceeding not be stayed and that the pending motions proceed to decision.

Respectfully submitted,

/s/

John F. McHugh

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**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

**COASTAL DISTRIBUTION, LLC and THE
NEW YORK AND ATLANTIC RAILWAY
COMPANY,**

Plaintiffs,

-against-

**THE TOWN OF BABYLON, A MUNICIPAL
CORPORATION, THE TOWN OF BABYLON
BOARD OF ZONING APPEALS and PETER
CASSERLY, AS COMMISSIONER OF
PLANNING AND DEVELOPMENT OF THE
TOWN OF BABYLON,**

Defendants.

05-CV-2032 (JS) (ETB)

Affidavit of Bruce A. Lieberman

Bruce A. Lieberman, being first duly sworn, states and deposes as follows:

1. I am Chairman of the New York and Atlantic Railway Company ("NYA"), and I have held that position since 1998. I have personal knowledge of the following facts.

2. On Long Island commercial and residential construction is the principal industry that can use rail freight transportation. Because it can use rail transportation both inbound and outbound, the construction industry constituted one of the most promising areas for NYA growth. However, the outbound movement of C&D debris requires a transloading facility. In addition, penetrating that market that has been almost exclusively truck served required individuals with familiarity and experience in the industry.

**ATTACHMENT E TO NEW YORK &
ATLANTIC RAILWAY COMPANY'S AND
COASTAL DISTRIBUTION, LLC'S
RESPONSE TO PETITION TO REOPEN**

3. In 2002, Coastal Distribution LLC's (Coastal's) principals and NYA officers including me met repeatedly to jointly determine exactly what market was available to rail transportation, and what facilities would be required to serve that market. In 2004, NYA retained Coastal, as our agent to supply that expertise and also to provide funding for the industry specific improvements needed to transload C&D debris.

4. In July of 2004, when the Farmingdale transload facility was first being operated, representatives of the New York State Department of Environmental Conservation ("NYSDEC") visited the site and reviewed the operating procedures. After an extensive review the NYSDEC concluded that it did not have authority to issue a transfer station "Part 360" permit because the Farmingdale facility was a railroad transportation facility operated on behalf of a rail carrier. However, the NYSDEC concluded that it retained police powers to control "odor, noise and vermin complaints." Notwithstanding the NYSDEC action, the Farmingdale facility has, since inception, operated in compliance with all substantive requirements for solid waste transfer and transload facilities. During the subsequent litigation over this facility, NYSDEC inspectors have continued to visit the facility and conduct informal reviews to assure that the facility is operating in a sanitary and appropriate manner. Neither NYSDEC nor any neighbors, local governments nor any one else has made any complaint or assertion that the facility is not in compliance with such standards, or that it creates any kind of health, safety or environmental problems.

5. From the first operations of the new structure, I continued to meet frequently with Coastal's principals and review the progress in increasing throughput at Farmingdale as well as to confirm the effectiveness and cleanliness of operations. In addition the

President and the Director of Marketing have spent hours of time at the facility, observing operations and discussing efforts to increase throughput at Farmingdale.

6. Shortly after the Surface Transportation Board first ruled that the Farmingdale facility was not subject to STB jurisdiction, NYA and Coastal agreed to seek to enter into a consent agreement with the NYSDEC, which would formally subject the facility to the provisions of the New York Environmental Conservation Law (ECL) and the jurisdiction and regulations of the NYSDEC. On October 17, 2008, the NYSDEC inspected the facility and found it in full compliance with all substantive regulations. A copy of the Inspection Report is attached as Attachment A. On November 3, 2008, the parties entered into an Order on Consent, a copy of which is attached as Attachment B. Under this Order, the facility is temporarily authorized to continue to operate, in compliance with the ECL, pending the filing of an application for, and the issuance of a solid waste rail facility permit. Accordingly, the Farmingdale facility is operating in full compliance with New York law regarding waste transfer facilities.

7. October 16, 2008, President Bush signed H.R. 2095 enacting the "Clean Railroads Act of 2008" (Act) as part of a comprehensive railroad safety bill. The Act divests the Surface Transportation Board (STB) of jurisdiction over solid waste rail transfer stations and requires all solid waste rail transfer stations to comply with the substantive requirements of State law, including permit requirements but expressly excluding municipal or local level regulation. The Act also provides that State and local "siting" limitations do not apply to facilities that were operating on October 16th, unless the STB – on the application of the State Governor – expressly finds that such local limitations outweigh the national interest in rail transportation in a particular case.

8 Babylon has made numerous attempts to shut down the Farmingdale facility by introducing legislation in Albany aimed directly at this facility. The bills would amend the Public Authorities Law by granting local governments jurisdiction over solid waste management facilities on MTA property, jurisdiction "on a par" with that of the NYSDEC. In each of the last three legislative sessions, such a piece of special legislation has been introduced. Each time, the Governor— Pataki (R), Spitzer (D) and Patterson (D) — has used his veto to prevent interference with the Farmingdale facility, for the reason that closure of the Farmingdale facility would greatly increase the number of waste trucks on the highways. Attachments C1, C2 and C3 are copies of the respective veto messages.

9. Because the contractual arrangement between NYA and Coastal finally proved unacceptable to the STB, and the STB declined to reconsider its original decision, NYA and Coastal agreed to revise our respective responsibilities at Farmingdale for the sole purpose of attempting to meet the STB's stated concerns, increasing NYA's involvement and demonstrating more plainly that this facility is NYA's and it is operated for the railroad in order to increase substantially the available rail traffic on Long Island. A copy of the Amended Transload Operating Agreement is attached as Attachment D. - -

10. NYA could simply hire its own equipment operators and terminate its agency relationship with Coastal, and that would presumably silence all of Babylon's objections. However, we prefer not to do that, because we believe that Coastal is a more qualified and more effective operator than NYA itself. The railroad's core competency is moving railcars. Coastal's management on the other hand has years of experience in railroad distribution of construction materials and waste in this region. They are familiar with the most up-to-date methods and

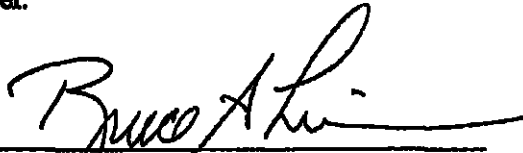
equipment, and with the waste disposal business. Accordingly we believe that the railroad is better served by retaining Coastal to operate our facility than by hiring our own employees.

11. Pursuant to the terms of the Clean Railroads Act and the provisions of the Consent Order, NYA and Coastal are finalizing a "Part 360" permit application which will be submitted to the NYSDEC on or before February 1, 2009, and under the Act, the Farmingdale facility can remain in operation until the permit is either granted or finally denied. In the meantime, by virtue of the Act and the Consent Order, the Farmingdale facility will continue to be operated in full compliance with all substantive requirements of the ECL and the NYSDEC regulations.

12. NYA and Coastal, on our behalf, has been and continue to operate a sanitary and efficient facility that has brought 3,200 cars or more of freight to our railroad every year. The operation directly benefits NYA, not only in generating revenue, but also in achieving a key goal of the creation of NYA -- increasing rail movements of freight to and from Long Island. Also, because we pay the MTA a fee per car for every car we move, Coastal's operation of the Farmingdale facility directly generates financial benefits for the MTA. Finally, this activity takes thousands of truck loads off the highways. Each rail car holds about 5 truck loads, so every one of those 3200 plus rail cars takes 5 loaded and 5 empty trucks off the roads and highways of Long Island and communities farther inland; that is about 32,000 trucks per year.

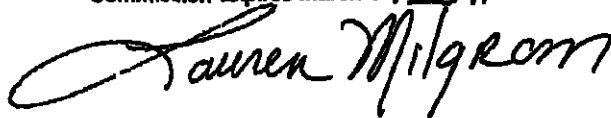
Affirmation

I swear that I have personal knowledge of the foregoing facts and that they are true and correct to the best of my knowledge and belief.


Bruce A. Lieberman

SUBSCRIBED AND SWORN to
before me this 13th day of November, 2008.

LAUREN MILGROM
Notary Public, State of New York
No. 81-4854052
Qualified in New York County
Commission Expires March 30, 2011
Notary Public





New York State Department of Environmental Conservation
Division of Solid and Hazardous Materials
6 NYCRR Part 360-16 Inspection Report - Construction and Demolition Debris Processing Facility

Facility Name Coastal Distribution, LLC	Facility ID 52T118	Date 10/17/08	Time 11:30	Regulatory Status Permitted <input type="checkbox"/> Registered <input type="checkbox"/> Under Order <input type="checkbox"/> Exempt <input type="checkbox"/> For a registered facility, inspect only items printed in red
Facility Location 1633 New Highway, Farmingdale, NY 11735	Region 1	Weather Conditions 68°F Sunny		

Violations of Part 360 are Subject to Applicable Civil, Administrative and Criminal Sections Set Forth in ECL Article 71, and as Appropriate, the Clean Water and Clean Air Act as Additional and/or Multiple Violations May Be Described on the Attached sheet.

This form is a record of conditions which are observed in the field at the time of inspection.
Items marked NI Indicate no inspection and do not mean no violation has occurred.

C N I V Facility Management

- ☒ 1. Facility is authorized and solid waste management occurs within approved area. 360-1.7(a); 360-1.8(h)(1),(5), 360-18.1
- ☒ 2. Facility accepts only those solid waste materials authorized for management at the facility. 360-1.14(e),(f), 360-18.1(a),(d), 360-18.3(h)(4), 360-18.4(b)
- ☒ 3. Facility components are maintained and operated in accordance with authorization. 360-1.14(f); 360-18.4(a)
- ☒ 4. O&M Manual is maintained and available for reference and inspection. 360-18.4(a)
- ☒ 5. Operational records are available where required. 360-1.4(d), 360-1.8(h)(8), 360-1.14(e)(2),(l), 360-18.4(b)(2),(l),(l)

Operation Control

- ☒ 6. Solid waste is sufficiently confined or controlled. 360-1.14(j), 360-18.3(h)(4), 360-18.4(b)(5)
- ☒ 7. Dust is effectively controlled. 360-1.14(k), 360-18.3(g)(5), 360-18.3(h)(5), 360-18.3(b)(5)
- ☒ 8. Vectors and vector breeding areas are effectively prevented/controlled. 360-1.14(j), 360-18.3(h)(5), 360-18(b)(5)
- ☒ 9. Odors are effectively controlled. 360-1.14(m), 360-18.3(h)(5), 360-18.4(b)(5)
- ☒ 10. Adequate shelter for mobile equipment for routine maintenance and repair is provided. 360-1.14(o)
- ☒ 11. Noise levels are controlled to prevent transmission of sound levels above the allowable levels off-site. 360-1.14(p), 360-18.3(h)(5), 360-18.4(b)(5)
- ☒ 12. Open burning occurs only in accordance with a Department issued burning permit. 360-1.14(q)
- ☒ 13. Facility has adequately heated and lighted shelters, safe drinking water supply, sanitary toilet facilities, and radio or telephone communications. 360-1.14(r)
- ☒ 14. Facility operator has a copy of all applicable permits, conditions, contingency plan, operations and maintenance report, and the most recent annual report. 360-1.4(u)(1)
- ☒ 15. An air monitoring program is implemented to monitor dust, odors or other air pollutants at and emanating from the facility, where required by the Department. 360-18.4(b)(5)(h)

Water

- ☒ 16. Solid waste is prevented from entering surface waters and/or groundwaters. 360-1.14(b)(1)
- ☒ 17. Leachate is minimized and discharge to waters is prevented/controlled. 360-1.14(b)(2), 360-18.3(f)(2), 360-18.4(g)

C N I V Access

- ☒ 18. Access to the facility is adequately controlled. 360-1.14(d), 360-18.4(h)
- ☒ 19. Onsite roads are passable. 360-1.14(h), 360-18.3(g)(4)
- ☒ 20. Attendant is present during all operational hours to control access and receive solid waste, where permanent operating equipment exists. 360-1.14(d)

Waste Handling

- ☒ 21. Incoming waste is inspected before acceptance and the C&D debris accepted is weighed or measured before unloading. 360-18.4(b)(2)
- ☒ 22. Proper separation of materials and adequate supervision is provided to ensure that waste wood is unadulterated and not contaminated if it is to be pulverized or processed separately from other C&D. 360-18.4(o)(3)
- ☒ 23. Adequate storage for incoming C&D debris is available. 360-18.4(f)(1)
- ☒ 24. Unauthorized solid waste material received at the facility is removed within 24 hours. 360-18.4(f)(1)
- ☒ 25. Processed and Unprocessed C&D debris is not stored uncovered at the facility for a period exceeding 30 days. 360-18.4(f)(2)*
- ☒ 26. Processed and unprocessed C&D debris is not stored enclosed or covered at the facility for a period exceeding 90 days. 360-18.4(f)(2)*
- ☒ 27. Processed and unprocessed C&D debris storage piles do not exceed 20 feet in height and the area at the base of the pile does not exceed 8,000 square feet. 360-18.4(f)(3)
- ☒ 28. C&D debris storage piles are not located in excavation or below normal grade. 360-18.4(f)(3),(5)
- ☒ 29. A minimum separation distance of 25 feet is maintained between C&D debris storage piles and 50 feet is maintained between storage piles and property boundaries. 360-18.4(f)(3)
- ☒ 30. Recyclables recovered from the C&D debris are not stored at the facility for a period of 60 calendar days. 360-18.4(f)(4)
- ☒ 31. Screenings which meet all the requirements for an alternative daily cover material and screenings which received an approval of petition for a beneficial use determination are not stored uncovered at the facility for a period of 15 calendar days. 360-18.4(d)(1), 360-18.4(f)(5)

Other

- ☒ 32. Telephone numbers to emergency response agencies are conspicuously posted in all areas at facility where telephones are available. 360-1.14(e)
- ☒ 33. Fire protection and detection equipment is available. 360-18.4(b)(4)

Continuation sheet(s) attached? ☐ Yes ☒ No

If Yes, indicate number of continuation sheets attached _____

Jie Zhao, EEI

Name of Inspector/Title

Signature

Eddie Mullian

Name of Facility Representative/Title (Please Print)

Signature (acknowledging receipt of a FACILITY COPY)

Date

EXHIBIT

A

* except the storage of recognizable uncontaminated concrete and other masonry waste, asphalt pavement, brick, soil, or rock that has not been in contact with a spill from a petroleum product hazardous waste, or industrial waste and that is not commingled with any other solid waste. 360-18.4(f)(5)

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

X

In the matter of an existing rail-haul solid waste management facility that pursuant to a decision of the federal Surface Transportation Board (Docket No. 35057) is required to submit to the New York State Department of Environmental Conservation an application for a permit to operate a solid waste management facility by

ORDER ON CONSENT

COASTAL DISTRIBUTION, LLC

File No. R1-20080308-84

(Suffolk County)

Respondent.

X

WHEREAS:

1. **COASTAL DISTRIBUTION, LLC** (hereinafter referred to as the "RESPONDENT,") is a domestic business limited liability company duly authorized to conduct business in the State of New York, and retains an interest in the real property located at 1633 New Highway, in Farmingdale, Town of Babylon, County of Suffolk, State of New York, which is owned by the Pinelawn Cemetery (hereinafter the "Site"). In 1904, Pinelawn Cemetery leased the Site to the Long Island Railroad ("LIRR"), and the Site remains under lease to the Metropolitan Transit Authority (hereinafter the "MTA"), the successor in interest to, and the parent of LIRR until 2102. In 1997, New York Atlantic Railway Company acquired all freight operations from LIRR/MTA and, thereafter, entered into an agreement with the RESPONDENT; and

2. The New York State Department of Environmental Conservation (hereinafter referred to as the "DEC" or "the Department") is an executive department of the State of New York with jurisdiction over the environmental policy and laws of this state, pursuant to, *inter alia*, the Environmental Conservation Law (hereinafter referred to as the "ECL") §3-0301. In particular, DEC has jurisdiction over solid waste in the State of New York, pursuant to Articles 27 and 71 of the ECL; and

3. Pursuant to a decision dated January 31, 2008, by the federal Surface Transportation Board (Docket No. 35057), the Department has determined that the RESPONDENT must submit an application for a permit to operate a solid waste management facility, and that during the interim period the Department shall allow the RESPONDENT to temporarily continue to operate its solid waste rail transfer facility with the understanding that



the RESPONDENT shall comply with all applicable solid waste law, Article 27 of the ECL, and its implementing regulations found in Part 360 of Title Six of New York Compilation of Codes, Rules and Regulations (hereinafter "6 NYCRR"); and

4. Prior to the decision of the Surface Transportation Board, the Department had made a determination that the Department was preempted from regulating RESPONDENT'S activities and operations by federal law, the Interstate Commerce Commission Termination Act and could not require the Respondent to obtain a permit to operate a solid waste management facility; and

5. Effective October 16, 2008 the "Clean Railroads Act of 2008"¹ (the "Act") was enacted requiring each solid waste rail transfer facility to comply with all applicable Federal and State requirements preventing the abatement of pollution, protection of the environment and public health and safety, to the same extent as required for any similar solid waste management facility.

6. The Act defines a solid waste rail transfer facility to be the portion of the facility owned or operated by or on behalf of a rail carrier, where solid waste, as a commodity to be transported for a charge, is collected, stored, separated, processed, treated, managed, disposed of, or transferred, when the activity takes place outside of original shipping containers.

7. The Act further provides that a solid waste rail transfer facility operating as of the date of enactment of the Act has 180 days to submit, in good faith, a complete application for all required State permits, except siting permits, to the appropriate permitting agency and shall be allowed to continue to operate the facility until the permitting agency has either approved or denied the permit(s).

8. The RESPONDENT desires to enter into the within Order with the Department for the purpose of establishing temporary authority to operate a solid waste rail transfer facility at the Site, to apply for a Permit to Operate, to address operational and recordkeeping requirements that may affect the operations, activities and environmental compliance at the Site, and to otherwise comply with the provisions of the ECL and the Act.

WHEREAS, the Department has determined that it is in the public interest to enter into this Order and to have the RESPONDENT submit an application for a Permit to Operate a solid waste rail transfer facility;

NOW, having considered this matter and being duly advised, IT IS ORDERED THAT:

I. Schedule of Compliance

¹ H.R. 2095, Sec 601 et seq.

A. Submission of Annual Report for 2007. Within 30 days of the effective date of this Order, the RESPONDENT agrees to submit an annual report (Transfer Station Annual Report - DEC form) to the Department's Central Office and Region One Solid Waste Engineer for solid waste received during the year 2007. The report must contain the total amount of waste received by weight or volume, compiled by waste type, the total quantity of waste received during each quarter of 2007, the origin of the waste, and the destination of the waste.

B. Submission of Permit to Operate a Solid Waste Management Facility. Within 90 days from the effective date of this order, the RESPONDENT agrees to submit a complete Part 360 Permit Application to the Department's Region One Division of Environmental Permit Administrator. The submission must include a statement from the leaseholder, Metropolitan Transit Authority that provides an explanation of the RESPONDENT'S property rights.

C. Until issuance of a Part 360 Permit to Operate a solid waste rail transfer facility, the RESPONDENT agrees to comply with all applicable solid waste laws pursuant to Article 27 of the ECL, and its implementing regulations pursuant to Part 360 of 6 NYCRR.

D. Should circumstances arise that prevent Respondent from being granted a Part 360 permit by November 1, 2009, provided the Department has determined that the Part 360 Permit Application is complete, an extension of time to continue operating shall be granted, provided the Respondent is diligently participating in the permit review process.

II. Civil Penalty.

A. With respect to the continuing violation of operating a solid waste management facility without a permit from January 31, 2008, the Department hereby assesses against RESPONDENT a civil penalty in the amount of TEN THOUSAND (\$10,000) DOLLARS, however, RESPONDENT'S obligation to pay such assessed penalty is hereby SUSPENDED until such time as the Department determines that RESPONDENT has violated any term or condition of this Order.

B. In the event that RESPONDENT shall be required to pay the assessed civil penalty, Respondent shall do so by paying the \$10,000 to the Department in the form of a certified check or money order only, on or before such date as the Department may determine such penalty to be due and owing, but in no event shall that date be less than 30 calendar days after the date of the Department's determination that RESPONDENT shall have violated this Order; and by submitting the payment to the Department at the following address:

New York State Department of Environmental Conservation
Region 1
50 Circle Road
Stony Brook University
Stony Brook, New York 11790-3409

ATTN: Vernon G. Rail
Regional Attorney

DEC File No.: R1-20080308-84

C. The civil penalty assessed under this paragraph of this Order shall not discharge **RESPONDENT** from the obligation to comply with any of the provisions, terms, and conditions established under this Order.

- III. Failure to Comply. **RESPONDENT'S** failure to comply with any provision of this Order shall constitute a default and a failure to perform an obligation under this Order and shall be deemed to be a violation of both this Order and the ECL,
- III. Reservation of Rights. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting any of the civil, administrative, or criminal rights of the Department or of the Commissioner or her designee, including, but not limited to, nor exemplified by, the rights to recover natural resources damages and to exercise any summary abatement powers or authorities with respect to any party, including **RESPONDENT**.
- IV. Termination and Reservation of Rights.
- A. This Order on Consent, shall be deemed completely satisfied and shall terminate when each of the following conditions has been fully satisfied: (1) DEC's written verification of timely completion of the compliance actions required by Paragraph I above; and (2) Respondent is issued, a Part 360 permit to operate a solid waste rail facility.
- B. Upon the completion of the compliance items set forth in Paragraph I, and the issuance of a Part 360 permit, DEC shall release **RESPONDENT** from further liability for penalties under the ECL arising from the violations set forth above. However, nothing herein shall be construed as a release or waiver by DEC of its rights to: (1) seek injunctive relief to abate any violation of law or this Order; (2) seek stipulated penalties and entry of judgment as provided in this Order; (3) seek penalties and other relief for any violations not set forth in this Order or its Appendices; (4) reallege the violations listed in this Order to obtain injunctive relief or damages in support of natural resource

damage claims; (5) seek to modify, suspend, or revoke any DEC-issued permit; (6) seek any applicable criminal sanctions against RESPONDENT or any other party; or (7) seek issuance by the Commissioner or his duly authorized representative, of a summary abatement Order against RESPONDENT. In addition, DEC reserves all such rights as it has to require RESPONDENT to take any additional measures required to protect human health or the environment.

- V. Indemnification. RESPONDENT shall indemnify and hold harmless the Department, the State of New York, their representatives, employees and agents for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Order by RESPONDENT, their directors, officers, employees, servants, agents, successors or assigns.

- VI. Binding Effect. The provisions of this Order shall inure to the benefit of be binding upon the Department and RESPONDENT and their successors and assigns.

- VII. Submittals

Any and all communications or submittals that are required by this Order shall be sent to the Department at the following address:

Syed Rahman, P.E.
Regional Solid Waste Engineer
New York State Department of Environmental Conservation- Region 1
Stony Brook University
50 Circle Road
Stony Brook, NY 11790-3409

- VIII. Modification. In those instances in which RESPONDENT desires that any of the provisions, terms or conditions of this Order be changed, each shall make written application, setting forth the grounds for the relief sought, to the Commissioner, c/o the Regional Attorney, 50 Circle Road, Stony Brook University, Stony Brook, New York 11790. No change or modification to this Order shall become effective except as specifically set forth in writing and approved by the Commissioner or the Commissioner's designee.

- IX. Future Compliance. RESPONDENT shall conduct all activities and operations at Site in strict conformance with federal and New York State solid waste laws and regulations. For the purpose of ensuring compliance with this Order, duly authorized representatives of this Department shall be permitted access to the subject Site during reasonable hours, in order to inspect and/or require such tests as may be deemed necessary to determine the status of RESPONDENT'S compliance herewith.

- X. Unforeseen Events. RESPONDENT shall not suffer any penalty under any of the provisions, terms and conditions hereof, or be subject to any proceedings or actions for any remedy or other relief, if RESPONDENT cannot comply with any requirements of the provisions hereof because of an Act of God, war, riot, or other catastrophe as to which negligence or willful misconduct on the part of Respondent was not foreseen or a proximate cause, provided however, that the RESPONDENT shall immediately notify the Department in writing, when they obtain knowledge of any such condition and shall request an appropriate extension or modification of the provisions hereof. RESPONDENT will adopt all reasonable measures to prevent or minimize any delay.
- XI. Entire Agreement. The provisions of this Order, including Appendix A, constitute the complete and entire Order issued to RESPONDENT. No term, condition, understanding or agreement purporting to modify or vary any term hereof shall be binding unless made in writing and subscribed by the party to be bound. No informal oral or written advice, guidance, suggestion or comment by the Department regarding any report, proposal, plan, specification, schedule, comment or statement made or submitted by RESPONDENT shall be construed as relieving RESPONDENT of their respective obligations to obtain such formal approvals as may be required by this Order.
- XII. Effective Date. The effective date of this Order shall be the date upon which it is signed by the Commissioner or the Commissioner's designee on behalf of the Department.

Stony Brook, New York

Dated: November 3, 2008

ALEXANDER B. GRANNIS
Commissioner of the New York State
Department of Environmental Conservation

By: 

PETER A. SCULLY
Regional Director

CONSENT BY BUSINESS ENTITY

Respondent COASTAL DISTRIBUTION, LLC acknowledges the authority and jurisdiction of the Commissioner of Environmental Conservation of the State of New York to issue the foregoing Order, waives public hearing or other proceeding in this matter, accepts the terms and conditions set forth in the Order and consents to the issuance thereof.

Respondent : COASTAL DISTRIBUTION, LLC

By (signature):

Name (print):

Title :

an individual duly authorized by respondent to sign on behalf of the business entity named herein and whom may bind respondent to the terms and conditions contained herein.

Date:

NOTE TO NOTARY: All blanks MUST be completed.

ACKNOWLEDGMENT

STATE OF NEW YORK)
COUNTY OF Suffolk) ss.:

On the 31st day of October 31, 2008, before me, the undersigned, personally appeared Joseph Rutigliano, personally known to me who, being duly sworn, did depose and say that (s)he resides at 5 Mansion Dr. Old Westbury, NY 11568 (Full Address), that (s)he is the Managing Member (Title of Authorized Signatory) of Coastal Distribution, LLC, the described herein and which executed the above instrument; and that (s)he signed her/his name thereto with full authority so to do.

Notary Public, State of New York

Vernon G. Raul
VERNON G. RAUL
Notary Public, State Of New York
No. 02RA8074433
Qualified in Suffolk County
Commission Expires May 20, 2010

STATUS:**A11933-A Rules (Sweeney) Same as S 8291-A FUSCHILLO****Environmental Conservation Law****TITLE....Relates to the special powers of the metropolitan commuter transportation authority and jurisdiction over an entity operating a facility processing solid waste****06/16/06 referred to corporations, authorities and commissions****06/19/06 amend (t) and recommit to corporations, authorities and commissions****06/19/06 print number 11933a****06/20/06 reported referred to rules****06/21/06 reported****06/21/06 rules report cal.1271****06/21/06 ordered to third reading rules cal.1271****06/22/06 passed assembly****06/22/06 delivered to senate****06/22/06 REFERRED TO RULES****06/22/06 SUBSTITUTED FOR S8291A****06/22/06 3RD READING CAL.2164****06/22/06 PASSED SENATE****06/22/06 RETURNED TO ASSEMBLY****08/04/06 delivered to governor****08/16/06 vetoed memo.357****08/18/06 tabled**

VETO MESSAGE:**VETO MESSAGE - No. 357****TO THE ASSEMBLY:****I am returning herewith, without my approval, the following bill:****Assembly Bill Number 11933-A, entitled:****"AN ACT to amend the environmental conservation law and the public authorities law, in relation to special powers of the metropolitan transportation authority"****NOT APPROVED**

This bill would amend the Environmental Conservation Law to provide local governments with jurisdiction over any entity, other than the Metropolitan Transportation Authority ("MTA"), that operates a facility to process, transfer, transload or convey contaminated or uncontaminated solid waste, hazardous waste or radioactive waste on the property of the MTA or any of its subsidiaries. The bill would also amend the Public Authorities Law to prohibit the MTA from knowingly allowing any entity to operate such a facility unless it is permitted by the Department of Environmental Conservation ("DEC") and in compliance with any applicable local law, rule or regulation. The bill would take effect immediately; provided, however, that existing facilities would have 180 days to comply with the provisions of the bill or cease operations

According to the sponsors, this bill is necessary to prevent third-party waste haulers from entering into agreements with railroad companies to preempt state and local regulation. I am advised that this bill

EXHIBIT**C1**

is intended to authorize the Town of Babylon ("Town") in Suffolk County to regulate a solid waste facility operated by Coastal Distribution ("Coastal") on MTA property located in the Town. A federal district court recently determined that the Coastal facility is under federal jurisdiction and is, therefore, not subject to local regulation. I am advised that this determination has been appealed to the United States Court of Appeal for the Second Circuit.

The City of New York ("City"), Department of State, DEC and others oppose the bill for a number of reasons. First, the opponents of the bill are concerned that authorizing local governments to restrict railway-related solid waste facilities, including the Coastal facility, would result in a significant increase in the transport of solid waste by truck, which would adversely affect the environment. Moreover, such opponents also believe that the bill would invite local government regulation in areas clearly preempted by federal law, which would result in costly and unnecessary litigation. In particular, the City is concerned that the broad language of the bill would impede its ability to implement its proposed Solid Waste Management Plan. Finally, opponents of the bill note that litigation involving local regulation of the Coastal facility presently is on appeal, and it would be premature to approve this bill during the pendency of the federal lawsuit.

While I commend the sponsors for their efforts to ensure the regulation of solid waste facilities and share their concerns regarding federal preemption, I am compelled to disapprove the bill based on the objections raised by the City.

The bill is disapproved.

(signed) GEORGE E. PATAKI

VETO MESSAGE:

VETO MESSAGE - No. 159

TO THE SENATE:

I am returning herewith, without my approval, the following bill:

Senate Bill Number 4967-A, entitled:

"AN ACT to amend the environmental conservation law and the public authorities law, in relation to special powers of the metropolitan transportation authority"

NOT APPROVED

This bill seeks to grant local governments outside New York City with jurisdiction over any entity - other than the Metropolitan Transportation Authority ("MTA") or its subsidiaries - operating a facility that processes, transfers, transloads or conveys solid waste on property of the MTA or its subsidiaries (including leased property). This bill also seeks to prohibit the MTA from knowingly allowing any entity to operate such a facility on its property unless such operation is permitted in a lawful manner by the Environmental Conservation Law or any municipal law relating to such a facility. This bill - like a similar bill that was vetoed last year by Governor Pataki - was proposed in response to a dispute relating to a construction and demolition waste facility operating in the Town of Babylon in Suffolk County.

Although I certainly recognize the desire of local governments to regulate rail facilities operating within their boundaries, as a general rule such local laws and ordinances are preempted by the federal Interstate Commerce Commission Termination Act ("ICCTA"). Indeed, the Babylon rail facility at issue here has been the subject of several years of federal litigation, and the courts have enjoined the local efforts to regulate the facility, holding that they are preempted by the ICCTA. In addition, this bill would place the MTA in the untenable position of pursuing its tenants for violations of state or local laws that are otherwise inapplicable pursuant to federal preemption.

Even if no federal preemption were involved, the provisions of this bill raise other significant concerns. For example, the New York State Department of Transportation ("DOT") indicates that closure of the rail facility in Babylon would result in an additional 39,500 loaded 20-ton trailer dump trucks - and an equal number of empty returning trucks - traveling on downstate roads and bridges each year, which would have an adverse impact on traffic congestion, bridge wear and air quality. In addition, the bill would permit localities to impose divergent requirements on rail operators, which could result in a patchwork of laws that conflict with or undercut statewide oversight by the Department of Environmental Conservation ("DEC").

The MTA, DOT, DEC and the Department of State all recommend that this bill be vetoed for the reasons noted above. I understand the desire of the proponents of this bill to provide greater local control over rail facilities, but because such restrictions generally are preempted by federal law, this legislation will not achieve its desired goals and could have other adverse consequences, and so I am compelled to veto

EXHIBIT

C2

this bill.

The bill is disapproved.

(signed) ELIOT SPITZER

STATUS:**S6737-A FUSCHILLO** Same as Uni. A.9655-A Sweeney

Environmental Conservation Law

TITLE....Relates to the special powers of the metropolitan transportation authority and jurisdiction over an entity operating a facility processing solid waste

01/15/08 REFERRED TO ENVIRONMENTAL CONSERVATION

01/23/08 1ST REPORT CAL.103

01/28/08 2ND REPORT CAL.

01/29/08 ADVANCED TO THIRD READING

06/12/08 AMENDED ON THIRD READING 6737A

06/17/08 PASSED SENATE

06/17/08 DELIVERED TO ASSEMBLY

06/17/08 referred to environmental conservation

06/19/08 substituted for a9655a

06/19/08 ordered to third reading rules cal.435

06/19/08 passed assembly

06/19/08 returned to senate

06/27/08 DELIVERED TO GOVERNOR

07/07/08 VETOED MEMO.13

VETO MESSAGE:

VETO MESSAGE - No. 13

TO THE SENATE:

I am returning herewith, without my approval, the following bill:

Senate Bill Number 6737-A, entitled:

"AN ACT to amend the environmental conservation law and the public authorities law, in relation to special powers of the metropolitan transportation authority"

NOT APPROVED

This bill seeks to grant local governments other than New York City jurisdiction over any entity - other than the Metropolitan Transportation Authority ("MTA") or its subsidiaries - operating a "solid waste management facility." This bill would also place municipal jurisdiction over such facilities on par with that of the Department of Environmental Conservation. Finally, this bill would allow municipalities to regulate solid waste management facilities on MTA property, not withstanding an MTA exemption from local laws regarding transportation-related activities.

This bill - like similar bills vetoed last year by Governor Spitzer and in 2006 by Governor Pataki - was proposed in response to a dispute relating to a construction and demolition rail waste transfer facility operating in the Town of Babylon in Suffolk County. Presently the case is in litigation awaiting final decisions from the Surface Transportation Board and an appellate court.

Although I certainly recognize the desire of local governments to regulate rail facilities operating within their boundaries, as a general

EXHIBIT

C3

rule such local laws and ordinances are preempted by the federal Interstate Commerce Commission Termination Act ("ICCTA"). Encouraging municipalities to regulate in this area could invite costly and unnecessary litigation involving federally preempted areas. But even if no federal preemption were involved, the provisions of this bill raise other significant concerns. For example, the New York State Department of Transportation ("DOT") indicates that closure of the rail facility in Babylon would result in an additional 32,825 loaded 20-ton trailer dump trucks - and an equal number of empty returning trucks - traveling on downstate roads and bridges each year, which would have an adverse impact on traffic congestion, bridge wear and air quality. In addition, the bill would permit localities to impose divergent requirements on solid waste management facility operators, which could result in a patchwork of laws that conflict with or undercut statewide oversight by the Department of Environmental Conservation ("DEC"). Also, MTA's transportation-related activities must remain free from local regulation to allow MTA to provide a uniform mass transit network. The MTA, DOT, DEC, the Department of State and the City of New York all recommend that this bill be vetoed for some or all of these reasons.

I understand the desire of the proponents of this bill to provide greater local control over rail facilities. However, because such restrictions generally are preempted by federal law, this legislation will not achieve its desired goals and could have other adverse consequences. Further, rail transport must be preserved as a viable alternative to truck traffic on local community roads.

The bill is disapproved.

(signed) DAVID A. PATERSON

**TRANSLOAD FACILITY OPERATIONS AGREEMENT
AS AMENDED, EFFECTIVE OCTOBER 1, 2008**

This TRANSLOAD FACILITY OPERATIONS AGREEMENT, effective as of October 1, 2008, is made and entered into by and between New York & Atlantic Railway Company ("RAILROAD"), and Coastal Distribution, LLC, a limited liability company of the State of New York ("COASTAL").

RECITALS

WHEREAS, RAILROAD is a common carrier by rail conducting freight operations over certain tracks and facilities of The Long Island Rail Road Company pursuant to a Transfer Agreement dated November 18, 1996 (the "Transfer Agreement") that permits RAILROAD to lease or license certain properties for use in furtherance of freight operations; and

WHEREAS, RAILROAD and COASTAL are parties to a Lease agreement dated July 11, 2002 (the "Lease") providing for the lease of a yard and transloading facility ("the Facility") at the Farmingdale (P.W.) Rail Yard, located in Babylon, New York (the "Yard"); and

WHEREAS, the parties desire to cancel the Lease and modify their relationship in accordance with the following agreement; and

WHEREAS, RAILROAD desires to continue to offer and provide transloading and rail transportation services via carload to certain railroad customers ("Customers") at the Facility in conjunction with RAILROAD's rail line and the interstate railroad network; and

WHEREAS, COASTAL desires to continue to operate the Facility for and on behalf of RAILROAD; and

WHEREAS, RAILROAD desires to engage COASTAL as RAILROAD's agent, to operate the Facility on RAILROAD's behalf; and

WHEREAS, the services rendered by COASTAL to any Customer shall be limited to providing transloading services between truck and rail for solid waste and bulk freight ("Commodities"), and contracting for transportation on behalf of Railroad with customers of Railroad in the discharge of RAILROAD's common carrier obligations.

AGREEMENT

NOW, THEREFORE, in consideration of the representations, warranties, covenants and agreements set forth in this Agreement:



ARTICLE I – TRANSLOADING OPERATIONS

1.01. **COASTAL Authority.** RAILROAD confirms the appointment of COASTAL as agent of RAILROAD and re-authorizes COASTAL to take the following actions on behalf of RAILROAD with full authority to bind RAILROAD for the acts of COASTAL taken within the scope of that authority. Pursuant to this agency, RAILROAD shall remain in all respects responsible to third parties for meeting and discharging RAILROAD's common carrier obligations.

1.02 **COASTAL Transloading Services.** COASTAL has and shall continue to transload Commodities between trucks and rail cars at the Facility, for and on behalf of RAILROAD, pursuant to the terms of this Agreement. COASTAL will provide this service to any and all Customers of RAILROAD who reasonably request this service, either at the request of the Customer or at the request of RAILROAD.

1.03. **RAILROAD Control of Operations.** RAILROAD shall control all aspects of the Facility's transloading operations, including, without limitation, Commodities handled, methods used to receive and transload Commodities, hours of operation, and traffic patterns and rules to be followed by Customers gaining access to and within the Yard. RAILROAD shall have the right to review and audit COASTAL's business records related to the operation of Facility during regular business hours and shall have the right to inspect COASTAL's operation of the Facility at any time. COASTAL operations at the Facility and the Yard shall be subject to the supervisory authority of the RAILROAD's General Manager at Glendale.

1.04 **RAILROAD Obligations.** RAILROAD shall provide the existing Facility, AS IS, WHERE IS. RAILROAD shall have the right to change the configuration of track at the Yard. RAILROAD does not warrant the condition of the Facility or the surrounding areas, the Yard or its equipment for any purpose. COASTAL has examined the premises and assumes the risk of using the premises for any purpose, and accepts all conditions and defects present thereon or associated therewith, known or unknown.

1.05 COASTAL Obligations.

(a) COASTAL shall perform transloading services between rail cars and trucks at the Facility for all Customers of the RAILROAD requiring such service to access the national railroad system. Such services shall include only those Commodities, movements and equipment approved by RAILROAD and COASTAL shall immediately cease and desist from any operations which shall be found to be in violation of any contractual or other obligations of RAILROAD, upon notice upon instruction from RAILROAD. COASTAL will perform all services in a good and workmanlike manner, in full compliance with RAILROAD operating and safety rules and all applicable laws, regulations and rules established by any governmental authority having jurisdiction.

(b) COASTAL shall apply and enforce RAILROAD's rules, regulations and directions with respect to RAILROAD Customers, COASTAL employees, visitors and other persons entering the Yard. COASTAL shall comply with any and all applicable health, safety, pollution and environmental rules or regulations.

(c) COASTAL shall, at its sole cost, acquire or provide any additional equipment (not provided by RAILROAD) reasonably necessary to conduct transloading operations at the Facility. COASTAL shall obtain RAILROAD's consent prior to bringing any such equipment to the Yard.

(d). Unless RAILROAD otherwise consents to the contrary, any signage located inside or outside of the Yard shall prominently indicate RAILROAD's name and/or logo.

1.06 Track Inspection and Maintenance: RAILROAD will remain responsible for the inspection and maintenance of all tracks within the Facility. .

1.07 Tender of Shipment: COASTAL shall ensure that each tender of Commodities for outbound rail shipment is made by or on behalf of RAILROAD'S Customer by e-mail, Electronic Data Interchange or other electronic means as agreed by the parties on a Uniform Straight Bill of Lading for carload shipments, properly classifying the Commodity to be shipped. COASTAL shall maintain records identifying the carloads of Commodities delivered and loaded for each Customer. Whenever COASTAL consolidates less than carload quantities of Commodities delivered by multiple shippers into unified loads, rendering it impractical to identify each shipper's Commodities, COASTAL will retain a list of those shippers and the quantities tendered for shipment that are contained in each block of cars shipped..

1.08 Loading and Unloading of Lading:

- (a) Compliance with Loading Rules: COASTAL shall have the sole responsibility, at its sole expense, for properly packaging, labeling, marking, blocking, bracing, placarding, and loading and unloading the Commodities tendered by Customers at the Facility to or from equipment to be transported pursuant to this Agreement. COASTAL shall comply with the loading rules of the AAR and applicable law. COASTAL shall further be responsible for insuring that the load limits of any equipment used for transporting the Commodities under this Agreement are not exceeded.
- (b) Overloaded or Improperly Loaded Equipment: In the event it is discovered that equipment has been overloaded or improperly loaded, RAILROAD may set out such equipment at a location convenient to RAILROAD and shall notify COASTAL by facsimile or e-mail of the location of the overloaded or improperly loaded equipment. COASTAL shall have 24 hours to remove excess weight or adjust load; or, if deemed safe, RAILROAD will move the overloaded or improperly loaded equipment to the nearest appropriate site. In any event, COASTAL shall be responsible for all costs for movement of the overloaded or improperly loaded equipment, and payment of any additional expenses incurred by RAILROAD due to improper loading or overloading of equipment. RAILROAD will move the affected equipment to its destination in such manner and at such time as is practicable after RAILROAD receives notice from COASTAL that the problem has been corrected.

1.09. Solid Waste Commodities: In the event that the Commodities include solid waste neither RAILROAD, nor COASTAL on behalf of RAILROAD, shall assume any obligation for the storage or disposal of any Commodities tendered other than to deliver them to the consignee or to another railroad for interchange. COASTAL may not accept solid waste Commodities for shipment without having obtained both a copy of a contract for the destination disposal facility obligating the said destination disposal facility to accept the Commodities, and visual confirmation that the Commodities comply with any specifications set forth in said contract.

1.10. Commodities and Analysis Reports: If requested, COASTAL shall provide RAILROAD with a copy of any Commodities analysis report that is required to be submitted to any federal, state or local agency or to the operator of any destination disposal sites.

1.11. Incidents: In the event of an incident during transportation over RAILROAD's lines under this Agreement, which involves a release of the Commodities transloaded by COASTAL, RAILROAD shall immediately notify COASTAL, and each party shall take immediate action.

- (a) In any such incident where the release was caused by an act or omission of RAILROAD, the expenses of cleanup shall be the obligation of RAILROAD under the terms of this Agreement,
- (b) In any such incident where the release was caused by an act or omission of COASTAL, the expenses of cleanup shall be the obligation of COASTAL under the terms of this Agreement.

1.12. RAILROAD Use. COASTAL acknowledges that RAILROAD may use the tracks and other yard facilities from time to time for railroad purposes.

1.13 Exclusive Use: Because it is neither feasible nor safe to have more than one operator in a single shed, using a single scale, loading railcars on a single track, RAILROAD shall not authorize any other party to conduct transload activities at the Farmingdale (P.W.) Yard or operate the Facility on RAILROAD'S behalf during normal work hours.

1.14 Non Interference: The parties shall use their best efforts to conduct their respective operations so as not to interfere with the operations of the other.

ARTICLE II – DOCUMENTS AND BILLING

2.01. Transport Documentation.

(a) All bills of lading and similar documents for outbound rail shipments from the Facility (collectively, "Transport Documentation") for the Commodities transloaded at the Facility shall be between RAILROAD and the Customer, but COASTAL, as RAILROAD'S agent, may execute such Transportation Documentation on behalf of RAILROAD. Shipments consolidated pursuant to section 1.09 will list "Coastal as agent for New York & Atlantic Railroad" as the shipper on bills of lading and a list of shippers shall be maintained by COASTAL by block of cars shipped each day.

(b) All Transport Documentation shall clearly and specifically state that RAILROAD does not take title to any Commodities.

2.02. Billing and Collection. Unless otherwise directed by RAILROAD, COASTAL, as collection agent for RAILROAD, shall promptly bill and collect from RAILROAD's outbound Customers all transportation charges. For inbound shipments, Coastal shall bill and collect RAILROAD's Transloading fee. COASTAL shall promptly remit sums due RAILROAD and all interline carriers for providing transloading and other rail transportation services. COASTAL shall make such payments within two business days of clearance of funds in COASTAL'S account. COASTAL shall provide RAILROAD with a monthly accounting of the rail cars and trucks loaded by COASTAL under this Agreement..

ARTICLE III -LOADING FEES

3.01. Rates and Fees. For and as its sole compensation for performing the transloading services for RAILROAD, COASTAL shall be entitled to collect and retain RAILROAD's fee for such services ("Transloading Fee"), as set forth in Attachment A hereto RAILROAD from time to time shall adjust the Transloading Fee at Coastal's request or with Coastal's consent. The Transloading Fee shall be sufficient to pay all operating expenses, a reasonable return on COASTAL's investment in materials handling equipment and other assets, and a reasonable profit margin. The Transloading fee will be posted by RAILROAD at the Facility and shall be quoted and collected from all RAILROAD's customers using the Facility. RAILROAD, and COASTAL on behalf of Railroad, will quote and collect only the specified Transload Fee for providing such service

3.02 Remittances: COASTAL shall pay to RAILROAD a Usage Charge consisting of twenty dollars (\$20) per railcar for each of the first 1,200 railcars loaded or unloaded in each twelve month period commencing August 5th ("Contract Year"). The Usage Charge for each loaded railcar in excess of 1,200 in any Contract Year (as determined by the anniversary of the effective date) shall be five dollars (\$5).

3.03 Payment. All invoices and/or fees charged to, or by, or payable to RAILROAD under this agreement shall be paid as provided in Section 2.02 above.

3.04 Discrepancies: Any discrepancy in billing or charges provided for under this agreement shall be reconciled between the parties. Any claim for adjustment or correction of charges paid, collected or remitted shall be made in writing by the party making the claim and delivered to other party within six (6) months of the date upon which the charge was paid, collected or remitted or shall be deemed waived. Any such claim shall be resolved pursuant to Section 7.03.

ARTICLE IV – COVENANTS OF COASTAL

4.01. Use of the Facility. During the term of this Agreement, COASTAL agrees and covenants as follows:

- (a)** COASTAL shall use the Facility only for the transfer of Commodities between trucks and railcars transported by RAILROAD.
- (b)** COASTAL shall access the Facility using only RAILROAD's primary access route off New Highway and shall not load or unload railcars outside the Facility.
- (c)** COASTAL may not allow other persons to operate the Facility without the prior written permission of RAILROAD which permission may be withheld for any reason.
- (d)** COASTAL, and RAILROAD, shall obtain any permits, approvals, licenses, waivers, consents or other governmental authority required to conduct transload operations at the Facility. Any costs incurred by RAILROAD in the process of obtaining any permits or operating authority for COASTAL will be paid by COASTAL, provided however COASTAL will not be responsible for any legal fees incurred by RAILROAD in reviewing submissions made by COASTAL or costs incurred by RAILROAD in obtaining such permits, approvals, licenses, waivers, consents, authority or exemptions in the name of RAILROAD.
- (e)** Should RAILROAD'S operations be interrupted by any government agency, public authority or any entity authorized to do so, due to any deficiency in RAILROAD's or COASTAL'S permits or as the result of either RAILROAD's or COASTAL's failure to obtain or comply with same, RAILROAD and COASTAL shall jointly defend such action.
- (f)** COASTAL shall take reasonable steps to assure that any hauler, motor carrier or other person, party or entity operating to, at or from the Facility is duly licensed and authorized to so operate under applicable law.
- (g)** COASTAL and its affiliates, agents, contractors, employees and invitees shall adhere to RAILROAD's standard safety policies then in effect based on rule books, and revisions thereto, as provided to COASTAL by RAILROAD.
- (h)** If COASTAL fails to take action required under this agreement within a reasonable time to comply with any such requirements, RAILROAD shall have the right, but not the obligation, to take the action required to comply with said requirements at the sole cost of COASTAL.

4.02. Condition of the Facility.

- (a)** COASTAL promises: 1) not to damage or misuse the Facility or allow its employees, contractors, agents or invitees to do so; 2) not to make any structural changes to the Facility without the prior written consent of RAILROAD; 3) to

immediately notify RAILROAD of any conditions at the Facility that are dangerous to human health or safety, or that may damage the Facility; 4) that if COASTAL vacates the Facility, all fixtures and improvements will be left in good condition, except for ordinary wear and tear and shall become the property of RAILROAD and/or the Long Island Railroad; and 5) not to permit waste of the Facility.

- (b) COASTAL, at its expense, shall be solely responsible for all necessary repairs, maintenance and upkeep of the Facility.
- (c) COASTAL shall not permit any liens to encumber the Facility for any labor or material furnished in connection with any work performed or claimed to have been performed in or about the Facility.
- (d) If the Facility is destroyed or damaged so it is unfit to be used for the purposes existing prior to COASTAL'S occupancy, COASTAL will be responsible for returning the Facility to that condition which existed on July 11, 2002.

4.03. Insurance. Coastal shall maintain the following types of insurance with insurance carriers having a current AM Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to RAILROAD:

- (a) Comprehensive General Liability Insurance with minimum limit per any one occurrence of \$5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not the case, then insurance as set forth in Section 4.03(d) shall be provided by COASTAL.
- (b) Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of \$2,000,000 for injury to or death of any one person, of \$5,000,000 for injury to or death of more than one person in any one accident, of \$5,000,000 for damage to property in any one accident.
- (c) Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability

- Bodily injury by Accident: \$1,000,000 each accident
- Bodily Injury by Disease: \$1,000,000 each employee & Policy Limit
- (d) Railroad Protective Liability Insurance in the amount of at least \$10,000,000. The form shall be on an occurrence basis and be executed in favor of RAILROAD as a named insured. Coastal and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against RAILROAD, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also

be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).

- (e) All of Coastal's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon RAILROAD'S request Coastal's certificates of insurance shall reflect the foregoing primary aspect).

COASTAL shall furnish RAILROAD Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to RAILROAD. The New York and Atlantic Railway, the Metropolitan Transit Authority and The Long Island Railroad shall be shown as additional insured.

4.04. Maintenance. COASTAL shall pay for all utility charges for the Facility. Except as otherwise set forth herein, COASTAL shall also pay the costs of maintenance and repair of the Facility.

4.05. Compliance with Regulations. COASTAL agrees to use the Facility in strict conformance with all applicable rules, regulations and ordinances of federal, state and municipal authorities including without limitation, any regulations concerning the handling of construction and demolition debris, except to the extent that RAILROAD and COASTAL agree such standards are not applicable.

ARTICLE V – TERM

5.01. Term. The Agreement shall expire on October 1, 2017; provided, however, that RAILROAD shall also have the right to terminate this Agreement prior to expiration in the event:

- (a) COASTAL breaches or fails to comply with any of the covenants, terms or conditions of this Agreement;
- (b) RAILROAD loses the right to provide COASTAL with access to the Facility for any reason; or
- (c) The Facility fails to transload 3,200 carloads in any Contract Year.

5.02 Renewal: The parties agree to discuss renewal terms for this agreement on and after October 1, 2017 unless COASTAL is in material breach of this agreement. In no event will this agreement be renewed or extended to apply after the expiration, termination or non-renewal of the Transfer Agreement.

5.03 Dangerous or Unlawful Condition: Notwithstanding section 5.02 above, should any condition be created by COASTAL on the Facility that creates or contributes to a dangerous condition or results in RAILROAD or COASTAL being cited for a violation of any federal, state or local law, rule, ordinance or regulation regulating health, safety or the environment or which could result in conviction of a crime, misdemeanor or violation, RAILROAD, in its sole and

absolute discretion, may immediately prohibit the activity giving rise to such safety or environmental hazard or violation pending a final determination of the facts or of liability. However, to the extent that any such citation is not made against RAILROAD (i.e. is made against COASTAL alone) or does not relate to an immediate dangerous human health or safety condition, RAILROAD shall not have the right to terminate the activity until there is a non-appealable finding by the agency or the court with applicable jurisdiction, so long as (i) COASTAL is contesting the rule, regulation, citation or charge in good faith; and (ii) COASTAL and RAILROAD are legally able to continue to operate the Facility under the terms of this Agreement.

5.04 Effect of Termination. Upon termination COASTAL shall cease using the Facility and shall immediately remove its personal property there from. Except for termination by reason of breach, upon termination, the parties' obligations to each other, except those obligations already accrued at the time of termination, shall immediately cease.

ARTICLE VI –INDEMNIFICATION

6.01 Indemnification. Coastal, hereby indemnifies RAILROAD, the Metropolitan Transit Authority and Long Island Rail Road Company, and their respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from Coastal's negligence or misconduct, or the negligence or misconduct of Coastal's employees or agents. , Notwithstanding the foregoing, COASTAL shall not be responsible for and will not indemnify RAILROAD, Metropolitan Transit Authority or Long Island Rail Road Company from and against any claims or liability arising out of or in connection with their own negligence or misconduct..

ARTICLE VI – MISCELLANEOUS

7.01 Termination of Lease. This Agreement supercedes the Lease dated July 11, 2002 by and between the parties and all amendments, modifications and interpretations thereof, and said Lease shall be hereby terminated and of no further force and effect.

7.02 Amendment and Waiver. This Agreement may not be amended or waived except in a writing executed by the party against which such amendment or waiver is sought to be enforced. No course of dealing between or among any persons having any interest in this Agreement will be deemed effective to modify or amend any part of this Agreement or any rights or obligations of any person under or by reason of this Agreement.

7.03 Notices. All notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement will be in writing and will be deemed to have been given when personally delivered or three business days after being mailed, if mailed by first class mail, return receipt requested, or when receipt is acknowledged, if sent by facsimile, telecopy or other electronic transmission device. Notices, demands and communications to COASTAL or RAILROAD will, unless another address is specified in writing, be sent to the address indicated below:

Notices to COASTAL:

Joseph Rutigliano, Principal
Coastal Distribution LLC
1633 New Highway
Farmingdale, N.Y. 11735
631-756-2000
Fax 631-756-2001

With a copy to:

John F. McHugh, Esq.
6 Water Street, Suite 401
New York, N.Y. 10004
212-483-0875
Fax: 212-483-0876

Notices to RAILROAD:

President
New York & Atlantic Railway Company
68-01 Otto Road
Glendale, New York 11385

With a copy to:

Ronald A. Lane, Esq.
Fletcher and Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2875
312-252-1500
Fax: 312-252-2400

7.04 Arbitration. Any controversy or claim arising out of or relating to this Agreement or the breach thereof, other than disputes which are within the exclusive jurisdiction of the Surface Transportation Board, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules (including the Emergency Interim Relief Procedures), and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties hereto shall first use commercially reasonable efforts to settle any dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of ten (10) days,

then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration as provided herein. The arbitrator shall be selected by the parties. In the event that they are unable to agree on the selection of an arbitrator within ten (10) days, the parties or their attorneys may request the American Arbitration Association to appoint the arbitrator. Prior to the commencement of hearings, the arbitrator shall provide an oath or undertaking of impartiality. The place of arbitration shall be New York, New York. Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this Agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the arbitration. The award shall be made within two (2) months of the filing of the notice of intention to arbitrate (demand), and the arbitrator shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by mutual written agreement of the parties. The prevailing party shall be entitled to an award of reasonable attorney fees. The determination as to which party, if any, is the prevailing party and whether and how much in attorney's fees shall be awarded will be made by the arbitrator.

7.05 Assignment. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by COASTAL without the prior written consent of RAILROAD, which consent will not be unreasonably withheld. A Change of Control shall be deemed an assignment for the purposes of this Agreement. RAILROAD shall have the right to assign this Agreement to any carrier which should succeed it as authorized by the Surface Transportation Board.

7.06 No Third Party Beneficiaries. Nothing in this Agreement shall confer any rights upon any person or entity that is not a party or permitted assignee of a party to this Agreement.

7.07 Severability. Whenever possible, each provision of this Agreement will be interpreted in such a manner as to be effective and valid under applicable Law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable Law, such provision will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

7.08 Complete Agreement. This Agreement is not a transportation agreement and the terms and conditions of any transportation of any Commodity to or from the Facility is governed by applicable tariff or transportation contract. This Agreement, and the other documents referred to herein contain the complete agreement among the parties and supersede any prior understandings, agreements or representations by or among the parties, written or oral, which may have related to the operation of the Facility in any way. However, the letter agreement entered into by the parties in June, 2004 in connection with LIRR's endorsement of COASTAL's application for zoning changes shall remain in effect unchanged. The section and paragraph headings of this Agreement are for reference purposes and shall not affect the meaning or interpretation of the Agreement.

7.09 Time of Essence. With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

7.10 Signatures; Counterparts. This Agreement may be executed in one or more counterparts, any one of which need not contain the signatures of more than one party, but all such counterparts taken together will constitute one and the same instrument. A facsimile signature will be considered an original signature.

7.11 Governing Law. This agreement shall be interpreted under the applicable laws of the United States and the regulations of such Federal Authorities as have exclusive jurisdiction over the activities contemplated. In matters involving the construction and interpretation of this document the internal laws, without regard for conflicts of laws principles, of the State of New York will apply.

7.12 Force Majeure. If either party is unable to meet its obligations hereunder as a result of acts of God, war, terrorism, insurrection, floods, strikes, derailments, or any like causes beyond its reasonable control, that party's obligations and those of such other party affected by such force majeure event, will be suspended for the duration of same; provided, however, that the parties will make all reasonable efforts to continue to meet their respective obligations during the duration of the force majeure event; and, provided further, that the party declaring a force majeure event shall promptly notify the other party of the same (including its anticipated duration), the nature of the force majeure event, and when it is completed. The suspension of any obligation owing to a force majeure event will neither cause the term of this Agreement to be extended nor affect any rights accrued under this Agreement prior to the force majeure event.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

COASTAL DISTRIBUTION, LLC

**NEW YORK & ATLANTIC
RAILROAD CO. INC.**

By: _____

By: _____

Its: Member

Its: President

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Its: Member

NEW YORK & ATLANTIC
RAILROAD CO. INC.

By: Paul M. Vieta

Its: President

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RAILROAD CO. INC.

By: _____

Its: President